SUPREME COURT, U. S.

FILED

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 354

HOWARD JAMES HANSEN,
d/b/a H. J. HANSEN AND COMPANY, and
HOWARD J. HANSEN Individually
Petitioner

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR DISTRICT OF COLUMBIA CIRCUIT

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Howard J. Hansen, the Petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in the above entitled case entered on the 30th day of April, 1968.

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is printed in Appendix "A" hereto, infra, page 7.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on the 30th day of April, 1968. Rehearing was denied on June 5, 1968. The jurisdiction of the Court is invoked under 28 U.S. Code, paragraph 1254(1.).

QUESTIONS PRESENTED

The questions presented for review are:

Was the transcribed testimony of witnesses in a prior case before the Securities and Exchange Commission, between the same parties, admissible in evidence against this Petitioner in a second case, where the witnesses were available and present at the hearing on the second case?

Was it a violation of the rights of the Petitioner to use testimony of others taken out of his presence in a prior case which had been dismissed, even though the parties were the same?

Was the error of using such transcribed testimony of witnesses against the Petitioner overcome by the production of the witnesses at the hearing on the second case some four years after the event?

If such production of the witnesses did overcome the objection to the transcribed testimony, would the lack of memory of such produced witnesses upon their cross-examination affect the use of such transcription of their testimony?

STATEMENT

An original proceeding was commenced on the 30th day of March, 1961 before the Securities and Exchange Commission against Atlantic Equity, Inc. The Petitioner was not a party nor was he involved in said original proceeding.

These original proceedings were later amended by adding to the proceedings on November 24, 1961, as a party, Siltronics, Inc.

Petitioner Hansen was notified that he might be "a cause" because of his involvement in an issue of stock by Siltronics, Inc. In this letter Hansen was given a choice of becoming a party to the cause or not being a party. Hansen elected not to be a party and made this fact known to the Respondent.

After he had made known this fact that he had elected not to be a party, he was officially excluded from the hearing. Later Hansen was called as a witness on May 18, 1962, and testified for two days; and the hearing was then transferred to Pittsburgh, Pennsylvania, but Hansen was never permitted to attend any of the hearings except for the two days when he testified. The hearings occupied forty-one days The hearings occupied forty-one days and they were held in Washington, D.C. and Pittsburgh, Pennsylvania. The last day of the proceedings in this case was June 28, 1962.

The Respondent voluntarily terminated these proceedings on the 21st day of December, 1962. The basis of the decision by the Respondent to dismiss was the result of a decision of the United States Court of Appeals for the District of Columbia Circuit—namely, *Treat & Company v. S.E.C.*, 113 U.S. App. D.C. 100, 306 Fed. 2d 260.

On the 24th day of January, 1963 the Respondent reinstituted proceedings. Hansen was duly notified, and this time he elected to be a party. On the 22nd day of April, 1963 an open hearing was begun, and this time the Respondent offered in evidence the prior record of the testimony of numerous witnesses as taken in the original proceedings, from which hearings Hansen had been excluded except for the two days when he had testified as a witness. This testi-

mony had been taken in the case which had been dismissed against Hansen and other parties.

To the offer of this transcript Hansen—through his counsel—objected. The question of the admissibility of this transcript was argued and, on June 5, 1963, the motion to offer the transcript of the record against Hansen was withdrawn.

On October 28, 1963 Hansen applied for a broker-dealer registration. On November 26, 1963 the Commission ordered a consolidation of the application by Hansen and reinstituted proceedings. On the 9th day of December, 1963 the Respondent again offered the transcript of the record which included the testimony of the witnesses in the prior dismissed case against Hansen. This is the same transcript of testimony which had been offered, objected to and withdrawn. On the 27th day of December, 1963 the motion was granted admitting the transcript of the testimony of numerous witnesses in the prior case against Hansen.

On the 2nd day of January, 1964 Hansen—no longer represented by counsel—appealed this decision to the Commission. The Commission confirmed said decision. The witnesses whose testimony had been admitted in transcript form were actually produced in person at the hearings and tendered for cross-examination. Beginning on January 14, 1964 Hansen—who was not an attorney—attempted to represent himself and to cross-examine the witnesses; but, because they had no substantial memory as to the events occurring between October, 1960 and July, 1961, he made no headway in establishing any facts through any cross-examination. He terminated all attempts to cross-examine after March 19, 1964, having attended hearings on approximately twenty days in this pursuit of the facts.

On July 11, 1967 a decision was rendered by the Respondent holding that Hansen was guilty of manipulating Siltronics, Inc. stock, and the application for registration as a broker-dealer was denied, and an Atlantic Equities, Inc. registration as a broker-dealer was revoked, and Hansen was named in this decision as a cause of the revocation. The

appeal to the United States Court of Appeals for the District of Columbia Circuit followed.

REASONS FOR GRANTING THIS WRIT

Your Petitioner says that the problem here presented is of grave importance to him, and perhaps to others in a like situation—although it does not indicate any "world-shaking" decisions.

Basically we seek the Court's aid in order to prevent a use of evidence which is so contrary to standard and accepted procedures as to amount to a violation of the rights of the Petitioner.

If it is to be the law that transcribed evidence taken of witnesses in cases which have been dismissed, can then be re-used in later proceedings, some guide or verification is needed in order that the methods used should not be enlarged but should be controlled.

The use of testimony from a prior case in all court and related proceedings is governed by the standards long accepted in the Anglo Saxon World—that is to say, that the record be available in transcribed or other form, that the parties be the same, and that the witnesses whose testimony is being used be not then available to testify in person.

Apparently the United States Court of Appeals for the District of Columbia Circuit is of the opinion that, even though the Petitioner was not present when the testimony was taken—having been excluded—the evidence still could be used. It was further of the opinion that, even though the witnesses were present and could have testified, they did not have to testify, but rather the record of their testimony taken some years before could be used.

And, finally, it believed that, although the witnesses whose testimony had been transcribed lacked memory of the prior events at the time of the hearing in the second case, nevertheless the obvious difficulties of cross-examining without memory on the part of the witnesses did not prevent the use of their transcribed testimony.

The same Court of Appeals many years before, passed upon what we consider to be a similar question, but reached a different conclusion. We rely upon *Karick v. Cantrill*, 53 App. D.C. 346, 290 Fed. 321 (also see *Bowie v. Hume*, 13 App. D.C. 286; Federal Rules of Civil Procedure 43(a); and Rule 14(a) of the Securities and Exchange Commission).

CONCLUSION

It is respectfully requested that this case be reviewed.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,282

HOWARD JAMES HANSEN, d/b/a H. J. HANSEN AND COMPANY, and HOWARD J. HANSEN, Individually, Petitioners

v.

SECURITIES AND EXCHANGE COMMISSION, Respondent

Petition for Review of an Order of the Securities and Exchange Commission

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Decided April 30, 1968

Mr. Mark P. Friedlander for petitioners.

Mr. Edward B. Wagner, Assistant General Counsel, Securities and Exchange Commission, of the bar of the Supreme Court of Illinois, *pro hac vice*, by special leave of court, with whom *Messrs. Philip A. Loomis*, General Counsel, *David Ferber*, Solicitor, and *William R. Schief*, Attorney, Securities and Exchange Commission, were on the brief, for respondent.

Before WILBUR K. MILLER, *Senior Circuit Judge*, and BURGER and WRIGHT, *Circuit Judges*.

PER CURIAM: Petitioner Hansen asks review of a Securities and Exchange Commission order[1] which denied his application for registration as a securities broker and found peti-

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[1] The Commission's order was issued pursuant to § 15(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78*o*(b) (1964 ed.).

tioner responsible, in part, for the revocation of the registration of Atlantic Equities Company. The only question raised on this appeal is whether the testimonial record of a prior proceeding[2] against Atlantic, involving the same stock fraud on which the Commission's order against petitioner was based, was properly admitted into evidence in this proceeding. Since the witnesses who testified in the prior proceeding were made available to petitioner for cross-examination, we find no error.[3]

The rules applicable to conventional judicial proceedings are not necessarily applicable to administrative proceedings. In a matter such as this one, involving charges of fraud and manipulation in the issuance of stock, with a lengthy record, it was within the Commission's discretion to receive the transcribed testimony, while still comporting with fairness to petitioner by offering the opportunity to cross-examine any witness whose transcribed testimony was so received.

Affirmed.

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[2] Petitioner was notified in the prior proceeding that, as an associate of Atlantic, under Commission Rule 9(b) he had a right to participate. 17 C.F.R. § 201.9(b) (Supp. 1968). He declined. *See Wallach v. Securities and Exchange Commission*, 92 U.S.App.D.C. 108, 202 F.2d 462 (1953).

[3] *See* A.L.I., MODEL CODE OF EVIDENCE, Rule 503 (1942); 5 J. WIGMORE, EVIDENCE §§ 1362, 1365, 1395 (3d ed. 1940). *See also Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 705-706 (1948); *Freight Consolidators Cooperative, Inc.* v. *United States*, S.D. N.Y., 230 F.Supp. 692, 699 (1964); *Garner* v. *Pennsylvania Public Utility Commission*, 177 Pa.Super. 439, 110 A.2d 907 (1955).